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Inter-American Bar Association

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COUNCIL MEETING—MEXICO CITY

The Barra Mexicana-Colegio de Abogados hosted a meeting of the Council of the Inter-American Bar Association in Mexico City, May 7, 8 and 9, 1980. During this meeting, the Council coordinated plans for the XXII Conference of the Association which will be held in Buenos Aires, Argentina.

REMARKS BY H. E. ALFONSO ARIAS-SCHREIBER, THE AMBASSADOR OF PERU

H. E. Alfonso Arias-Schreiber, the Ambassador of Peru to the United States, addressed the Inter-American Bar Association at a luncheon meeting held in Washington, D.C., on December 16, 1979, at the National Lawyers Club. Ambassador Arias-Schreiber is internationally recognized as an expert on the subject of the law of the sea. The following is the text of the Ambassador's address:

I thank the Secretary General for his kind words of introduction and for the opportunity I have been offered of addressing you in the pleasant and distinguished ambient of the Inter-American Bar Association.

When I was asked to speak here about the Conference on the Law of the Sea, I felt both enthusiasm and concern: enthusiasm because it is a captivating subject in which I have been involved during the past ten years as delegate of my country; and concern, because it has been so largely debated that it is not easy to say anything new to an audience as well-informed as this.

Therefore, instead of boring you with an academic speech, I have thought it more appropriate to proceed as follows. First, I will present a general outline of the Conference and explain its essential features: what it is about; why it has been convened; who participates; where it meets; when it started; when it will finish; and how it works. Then I will comment briefly on the scope of the new Convention, the innovations it contains, its deficiencies and loopholes, the pending matters, and what the prospects are for arriving at an agree-

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ment. Finally, I will respond to the questions you may wish to ask. Since I am speaking in a language which is not mine, I trust that you will forgive any faults of expression.

Starting with the first question, *what is this all about?* The present Conference on the Law of the Sea is the third of its kind organized by the United Nations for establishing a legal order designed to regulate the rights and obligations of States on the different uses and exploitation of the oceans. The first Conference took place in Geneva in 1958 and adopted four separate Conventions with respect to the following: the territorial sea; the continental shelf; the high seas; and fishing and conservation of living resources in the high seas. Since no agreement was reached as to the maximum limit of the territorial sea, in 1960 a second Conference was held, also in Geneva, for the purpose of establishing that limit, but once again it failed in its attempt to reach an accord. Ten years later, a third Conference was convened in order to review the rules pertaining to the ocean space as a whole.

Why was the Conference convened? Because in the interim a succession of new events had taken place in the economic, scientific, technological, as well as political and juridical fields. Scientific and technological advances had widened the possibilities of exploiting not only the seas' living resources, but also the mineral resources of the ocean floor and the subsoil thereof. As a result of the de-colonialization process, many African and Asian nations had become independent States. On the other hand, some Latin American countries had extended their national jurisdiction up to a limit of 200 miles.

Who participates in the Conference? All independent States, as of today around 160 countries; and also, as observers, some non-self-governing territories and several international organizations.

Where are the Conference's meetings held? Regularly in New York and Geneva, the two United Nations main sites. However, the second period of sessions of the Conference met in Caracas in 1974. It was agreed there that the new Convention should be signed in Caracas in recognition of the extraordinary facilities offered by the Venezuelan Government and also of the special contribution made by Latin America in reforming the Law of the Sea.

When did the Conference start? The work began in 1971 when the Seabed Committee, which had been meeting since 1968 to study the applicable regime for the seabed beyond national jurisdiction, was entrusted with the preparation of a comprehensive list of subjects and

issues relating to the Law of the Sea and with the drafting of treaty articles. The Preparatory Committee held six meetings from 1971 to 1973, and it was in 1973 that the United Nations General Assembly decided to convene a third Conference, the first session of which took place in New York in the month of December. Up to now, eight periods of sessions have been held, some of these in two stages.

Until when will the Conference meet? At the end of the Eighth Session, it was agreed that the last two meetings would be held in 1980. The first will be in New York during March and April, at which time the negotiating text of the Conference will be renewed and subsequently formalized into a draft Convention. Decisions will be taken during the second meeting in Geneva during July and August. Afterwards, the Conference will meet once again in Caracas for the signing of a new Convention, probably by the end of next year.

How is the Conference organized? In the first place, there is the Plenary which is not only the supreme body, but also functions as a Committee entrusted with preparing the preamble, the final clauses, and the procedures for the settlement of disputes. There is also a General Committee which recommends to the Plenary the measures to be adopted for ensuring the normal development of the Conference. Following are the three main Committees: the first related to the seabed beyond the limits of national jurisdiction; the second devoted to areas of national jurisdiction and the high seas; and the third concerned with the preservation of the marine environment, scientific research, and the transfer of technology. Finally, there is the Drafting Committee which is in charge of harmonizing the provisions contained in the negotiating text. The President of the Conference and the Chairmen of these Committees were elected according to the criteria of geographic distribution in order to have all five regional groups represented: Africa, Asia, Latin America, Western Europe and other States, and Eastern Europe. Aside from the aforementioned official bodies, various negotiating groups have been constituted, and several other groups of interest also do meet. Although the Conference Rules of Procedure provide the application of the voting system by simple majority at the level of Committees and by two-thirds at the Plenary level, on the basis of a gentleman's agreement, the method of consensus has been used for ensuring, to the extent possible, that the Convention be acceptable to all States.

Passing now to the draft Convention, it would be useful, I believe, to bring to your attention the following highlights concerning its scope and significance:

1. The draft Convention will gather into one single text provisions defining the rights and obligations of the States in all the zones of the ocean space, from coast to coast, and from the surface to the ocean depths. It will regulate the question of limits, navigation and other means of international communication, the exploration and exploitation of living and mineral resources, installations, the preservation of the marine environment, scientific research, transfer of technology, and procedures for the settlement of disputes. Besides the applicable rules related to the territorial sea, an exclusive economic zone, the continental shelf, and the high seas, the draft Convention will include specific provisions with respect to straits, archipelagic States, land-locked States, islands, enclosed and semi-enclosed seas, and a new regime for the management of the seabed and ocean floor beyond the limits of national jurisdiction. The text and its annexes contain more than four hundred Articles and represent the most extensive treaty ever to be negotiated at a United Nations conference.

2. The draft Convention has been prepared not by a commission of jurists from certain selected countries, but by representatives from all independent nations of the world. That is why the elaboration and the negotiation of the draft treaty articles have taken almost ten years, with the participation of thousands of delegates from varied professions and occupations such as diplomats, lawyers, politicians, naval officers, public servants, professors, economists, scientists, technicians, businessmen, and even in some cases, fishermen. On the basis of hundreds of proposals presented by each delegation or group of delegations and of general or specific debates on various topics and proposals, informal negotiating texts were written by the Presidents of the Conference and of the three main Committees and were reviewed and amended several times. As a result, what we have now is a composite Text which will be formalized as a draft Convention when the Conference meets again in March of next year.

3. The future Treaty on the Law of the Sea will no longer be the exclusive expression of the criteria and interests of the maritime powers, but the result of a general conciliation which, to the extent possible, will accommodate the rights and interests of the developed and developing countries and of the coastal and non-coastal States. This is a particularly important achievement in the progressive development of international law which for centuries had a European approach, was later enriched by the Western Hemisphere, and today has acquired an ecumenical character through the contributions of nations of the other continents.

The innovations of the future treaty compared with the 1958 Conventions may be summed up as follows:

1. In the first place, agreement has virtually been reached on the limit of the territorial sea, which shall not exceed twelve nautical miles, and a number of activities constituting violations of the right of innocent passage have been specified including any act of wilful and serious pollution.

2. At the same time, an exclusive economic zone has been created, up to a maximum limit of 200 miles, where the coastal State exercises sovereign rights for the purpose of exploring and exploiting, conserving and managing the living and non-living resources of the sea, its soil and subsoil, and for regulating other economic activities in the zone; the coastal State also has jurisdiction with regard to the establishment of installations, the conduct of marine scientific research, and the preservation of the marine environment, all this without prejudice to the freedoms of international communication.

3. Within this exclusive economic zone, an area adjacent to the territorial sea has been maintained, extending to a maximum limit of twenty-four miles, as a "contiguous zone" where the coastal State may exercise the control necessary to prevent and punish any infringement of its customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea.

4. With respect to the continental shelf, the exploitability test has been replaced by two new criteria: one of distance up to the 200-mile limit, and the second of natural prolongation of the land territory up to the outer edge of the continental margin where it extends beyond 200 miles, although negotiations are still continuing on the second item so as to establish a more precise limit.

5. The seabed area beyond the limit of national jurisdiction (that is, beyond the economic zone and the continental shelf) and the resources thereof have been recognized as the common heritage of mankind and, therefore, not subject to appropriation by any State. An International Authority will be established for organizing and controlling activities in the aforementioned area: activities which could be performed by the International Authority itself or through contracts between the International Authority and the States or natural and juridical persons.

6. In the straits used for international navigation, a right-of-transit passage has been provided to ensure uninterrupted travel by all ships and at the same time, to require them to refrain from any threatening

act against the sovereignty or independence of adjacent coastal States and to comply with those States' regulations pertaining to navigation, pollution, fisheries, customs, fiscal matters, immigration, and sanitation.

7. As far as the archipelagic States are concerned, their sovereignty has been recognized over waters enclosed within straight baselines connecting the outermost points of the outermost islands, over the air space above those waters, and, below, over the bed and subsoil thereof, without prejudice to the right of passage of ships of all States through the sea lanes established by the archipelagic State.

8. With regard to land-locked States, besides the recognition of their right to free access to and from the sea as well as free passage over territories of neighboring States, provisions have been made concerning their right to participate in the exploitation of the surplus of the living resources of the economic zone of coastal States of the same region and subregion; and this right has been also recognized for States with special geographical characteristics in order to satisfy the nutritional needs of their populations.

9. Concerning the preservation of the marine environment, very detailed norms have been established to ensure international cooperation and to regulate the rights and obligations of States with regard to pollution from different sources. In the case of pollution from ships, these regulations will permit coastal States to take effective measures to prevent or reduce such risks in accordance with generally accepted rules.

10. On marine scientific research, very precise rules have also been established to promote international cooperation and to define the rights and obligations of the States and competent international organizations. Those rules include the right of coastal States to authorize and control the activities of scientific research in their exclusive economic zones and continental shelves. The coastal State would be under obligation to grant its consent to projects which benefit mankind and which comply with certain requirements for the adequate participation of the coastal State.

11. Provisions have been made in the draft Convention for promoting development and transfer of marine science and technology on fair and reasonable terms and conditions, taking into account the interests of holders, suppliers, and recipients, particularly, among the last named, the developing countries. Although the provisions of the draft Convention do not specify in detail the relevant guidelines, criteria, and standards, they do establish the obligation of cooperation

in this field through bilateral or multilateral programs or through the creation of regional centers, especially in the developing countries, the functions of which have been contemplated in the draft Convention.

12. Finally, the negotiating text contains adequate provisions for resolving disputes by peaceful means. These include, by selection of the concerned parties, procedures accepted through previous agreements or, in their absence, the submission of the disputes to conciliation, to the Tribunal of the Law of the Sea, to the International Court of Justice, or to arbitral tribunals. The draft Convention establishes the rules for the choice of procedures, competence, provisional measures, applicable law, exhaustion of local remedies, binding force of decisions, limitations, and optional exceptions. In the Annexes of the draft Convention can be found the conciliation procedures and the statute of the Law of the Sea Tribunal, as well as general provisions regarding the arbitral tribunals and special procedures for arbitration related to fisheries, the preservation of marine environment, scientific research, and navigation.

You may think, in the light of what I have said, that the text of the draft Convention is perfect and that countries like mine should be very happy with the results achieved by the Conference. Speaking in general terms, there is, of course, no doubt that the new provisions have introduced certain fundamental changes in the old rules on the Law of the Sea, by recognizing the right of coastal States to regulate the management of their resources and to protect other related interests in wide zones of national jurisdiction, and by establishing beyond those areas a regime for the exploitation of the seabed which will allow the sharing of part of the resulting benefits among the States.

However, it would be wrong to infer that the draft Convention represents a net victory of the developing countries over the maritime powers. This is not so for three essential reasons:

First, because the maritime powers will enjoy to the same degree the use of very extensive economic zones and continental shelves; also, they will be allowed to continue fishing not only the surplus of coastal species, but of highly migratory species off the coasts of other States, mainly the developing countries.

Second, because the exploitation regime in the international seabed zone will permit the extraction, processing, and marketing of mineral resources from vast areas in that zone by the industrialized countries under highly profitable conditions.

Third, because the remaining provisions of the draft Convention protect the interests of the maritime powers not only with respect to the territorial sea, the transit passage through international straits and routes of the archipelagic States, the freedoms of navigation, overflight, and laying of submarine cables and pipelines in the exclusive economic zone, but also with regard to installations, scientific research, preservation of the marine environment against pollution, the transfer of technology, and the procedures for settlement of disputes.

On the other hand, besides several imperfections resulting from the method followed at the negotiations in which political criteria and ambiguous compromise formulas frequently prevailed, very important and delicate matters were omitted which were disagreeable to the maritime powers. Since it would take too much time to explain them in this briefing, I will only point out to you a few examples: first, the issue of peaceful uses of ocean space and zones of peace and security which was on the list of subjects but which the maritime powers refused to discuss. Second, military activities in the exclusive economic zones; thus far, the maritime powers have opposed the inclusion of a provision according to which warships and military aircraft should refrain from threatening actions against the security of coastal States. They have also opposed the express inclusion of a requirement for consent of the coastal States to the establishment of military installations in their exclusive economic zones. Third, the maritime powers have objected to provisions for marine scientific research from air space. In short, the Convention is silent about a series of obligations that might affect the freedom of the maritime powers to conduct activities related to their strategic plans.

Another matter the developing countries are not fully satisfied with is the one concerning the seabed regime beyond the limits of national jurisdiction. In this respect, we proposed that the International Authority to be established be granted power to conduct the exploration and exploitation of the seabed area for the benefit of mankind as a whole through an Enterprise in which all States would participate. We conceded that investors should not only cover their risks, but also have a reasonable margin of profit. However, we felt that once those profits were deducted, the rest should be shared among the members of the international community in application of the "common heritage of mankind" concept.

In any event, the developed countries did not wish to accept our proposal and offered instead what is called the "parallel system": half

of each designated area would be reserved for the International Authority to exploit through the Enterprise either directly or in association with developing countries; and the other half would be exploited by the contractor (that is, in fact, by entrepreneurs of the industrialized States) through contracts with the International Authority. In a spirit of compromise, we agreed to test this formula for a provisional period not exceeding twenty-five years, as long as the Authority had the assurance of financial and technological means to undertake operations from the outset and as long as arrangements were made for a Conference to revise the parallel system if, at the end of the provisional period, the results proved to be unsatisfactory.

This brings us up to the *present state of negotiations and the prospects for reaching an agreement.* Starting with the seabed area, there are still various matters to resolve, mainly related to financial arrangements, conditions to be applied to contractors and to the International Enterprise, control of production to prevent adverse economic effects on countries producing minerals on land, the transfer of technology, the composition of the Council and the voting system, procedures for the settlement of certain disputes, and the revision of the parallel system.

As to the zones of national jurisdiction, discrepancies still remain on some provisions which refer to the exclusive economic zone, the maximum limit of the continental shelf, the criteria for delimitation of maritime boundaries among neighboring States, and to scientific marine research.

On the other hand, it was only in the last session that negotiations really started concerning the final clauses of the Convention, and counteracting positions have been recorded in matters related to amendments or revisions, reservations, relation to other conventions, entry into force (including the establishment of a Preparatory Committee), transitional provisions, denunciation, and participation in the Convention.

Finally, the Drafting Committee has just initiated the process of perfecting the text and has suggested certain criteria to reconcile or harmonize the provisions of the Convention.

It is difficult to say in advance if there will be sufficient time to conclude the work of the Conference in 1980. That will depend on the willingness for conciliation, on the procedure adopted to finish the negotiations and to start the decision-making process, and on the

political climate that may exist at that time depending on the attitude of the participating States.

In this last respect, the most serious danger we may yet face would be the unilateral actions which certain industrialized countries might take to authorize, through domestic laws, the exploration and exploitation by their own nationals of the international seabed area without waiting for the Conference to end.

Even if assurances are given that such activities would not begin until a few years from now and that they would be conducted in accordance with the provisions of the Convention once it enters into force, the mere fact of moving legislation forward could have very negative effects on the Conference. On the one hand, the delegates of countries acting unilaterally could assume a more rigid position and invoke restrictions imposed by their own country's laws, thus obstructing the progress of the negotiations. On the other hand, other States, and particularly the developing countries, might react in an even more rigid manner because they would not agree to pursue negotiations under pressure of an "accomplished fact." Under these circumstances, they could claim that unilateral legislation would have invalidated the practice of consensus which so far has been respected by all participating States in the Conference and that those who had given a bad example would have no further authority to demand from other nations the maintenance of commitments to apply the consensus practice when the time comes to adopt the Convention.

In such a case, the consequences on countries acting unilaterally could be most serious: in the first place, because they would be left out of the new Convention on the Law of the Sea approved by the majority of the States in the international community; and in the second place, because the member States of the Convention could bring charges before the International Court of Justice or the Law of the Sea Tribunal against those States which had undertaken the exploration or exploitation of the seabed area beyond the limits of national jurisdiction in violation of the new international positive law applicable to ocean space. The activities conducted by nationals of those States would then be invalidated and, in addition to the loss of their investments, they could also be made responsible for the payment of compensation for damages caused to other members of the international community as a result of their illegal activities and, eventually, for taking improper possession of resources belonging to the common heritage of mankind.

Let us hope, then, that good judgment will prevail so as to prevent those risks and avoid unnecessary confrontations at a time when we are so close to coming to an agreement. Even if it would become essential to continue the negotiations until 1981, it would be worth such an effort rather than to leave unfinished a task so important to the peaceful coexistence of all States and to the orderly utilization of the ocean space. To the best of our ability, we shall do everything in our power during the next session of the Conference to try to solve those problems which are still pending, through formulas suitable to the concerns and interests of all the various countries.

Before concluding, I should like to add some last reflections that I believe to be appropriate for making a fair judgment on the significance of the Conference and its achievements. We are aware that public opinion feels frustrated because, after eight periods of sessions, we have not been able to approve a Convention. Perhaps some may think that we have prolonged the debates for the mere enjoyment of meeting year after year. Without denying that we have enjoyed seeing each other over the years and that we value the relationships we have established among ourselves, the truth is that we have done much more than that. A simple look at the negotiating text will suffice to realize the magnitude of the task already accomplished in spite of the complexity of the problems involved. But there is something else of greater importance: the results so far obtained have transcended the doors of the Conference and have been used by a great number of governments to review their laws and to make new arrangements.

Seeing things from this perspective, the United Nations Third Conference has contributed already to a fundamental reform of the old rules of the Law of the Sea. I am pleased to point out, as representative of a Latin American country, that among the Conference's most outstanding merits is the recognition and promotion of the States' practice relating to the institution of zones of national jurisdiction up to the limit of 200 miles. In our view, that practice constitutes *per se* the new international law in this field, as a testimony of the *opinio juris* expressed by the States' legislators and confirmed in the debates and texts of the Conference.

Of course, the approval of a universal Convention would have the virtue of establishing rules binding all States and of overcoming the differences presently existing among the States' national legislation. But whatever the outcome of the Conference may be, the exercise by coastal States of their sovereign and jurisdictional rights up to a

distance of 200 miles, for the purposes envisaged in their domestic laws, and the incorporation of these rights in the negotiating texts of the Conference are part of an irreversible process in the evolution of the Law of the Sea, which no State may validly contest ever again. Perhaps an even more revolutionary contribution is the principle, approved without objection, which declares the seabed area beyond national jurisdiction and the resources therein as the common heritage of mankind. Although there still remain differences of approach as to the ways and means of applying this principle, the mere fact of its endorsement and elaboration by the Conference has cleared the way to the establishment of a new regime which sooner or later will be implemented for the benefit of all nations.